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:: JUDGMENT ::

R.K. College Vs. Ramesh Chand & Ors.

S.B. CIVIL MISC. APPEAL NO.98/1995.

Against the award dated 28.06.1994 made by the Motor Accidents Claims Tribunal, Jodhpur in Claim Case No.214/1991.

Date of Judgment :: 22nd May 2007

HON'BLE MR. JUSTICE DINESH MAHESHWARI

Mr. B.L. Maheshwari, for the appellant.
Mr. R.K. Mehta, for the respondent No.3.

Reportable **BY THE COURT:**

This appeal under Section 173 of the Motor Vehicles Act, 1988 ('the Act') has been preferred by the owner of the vehicle involved in accident against the award dated 28.06.1994 made by the Motor Accidents Tribunal, Jodhpur in Claim Case No.214/1991 whereby the Tribunal has awarded compensation in the sum of Rs.44,621/- to the injured claimant for the loss suffered by him due to the injuries sustained in accident; but has exonerated the insurer of its liability on the ground that the vehicle was being plied on a nationalised route in contravention of the terms of permit.

Only the finding on exoneration of the insurer having been questioned in this appeal, a brief reference to the background facts would suffice. The claimant-respondent No.1 Ramesh Chand Vyas, while joining his wife Smt.Chandra Kanta as claimant No. 2, sought compensation in the sum of Rs.3,04,250/- against the driver, owner, and insurer of a mini bus bearing registration No. RJ19 P 0123 for pecuniary and non-pecuniary losses with the submissions that on 15.03.1991 they were travelling with other members of family from Jodhpur to Sivana in a Jonga Jeep bearing registration No. RRQ 7177; that they took halt at a hotel near village Jatiyasani at about 8:00-8:30 p.m.; that the claimant No.1 alighted and proceeded to answer the call of nature when the non-applicant No.1 brought driving rashly the aforesaid mini bus bearing No. RJ19 P 0123 and hit him on the wrong side of the road causing extensive bodily injuries; that the claimant No. 1 remained hospitalised for about 53 days, had to undergo operations for treatment of fractures on his right leg and right arm, his wife was also required to take leave from her job for about 6 months to attend on him; and that he has suffered permanent disablement of the affected limbs and was still under physiotherapy.

The non-applicants Nos. 1 and 2, the driver and owner of the mini bus, alleged in their reply, inter alia, that the claimant

himself was driving the jeep without licence and caused the accident with rash driving of the jeep whereby the mini bus of the non-applicants turned over and the claimant was thrown out of his jeep. It was also submitted that the bus was insured with the non-applicant No.3 at the relevant time.

The non-applicant No.3 insurer while filing a separate reply contended that the jeep driver had stationed the jeep on the road without any indication; that the accident occurred when the oncoming bus suddenly applied the brakes in order to save the jeep; and that the accident would not have occurred if the jeep were parked down the road. In its additional pleas, the insurer took the defence, inter alia, that the driver of the bus was not holding valid professional licence; that at the time of incident, the vehicle was not covered under valid permit; and that the owner of the vehicle RJ19 P 0123 has violated the policy conditions and, therefore, the insurer was not liable. Such objections of the insurer, relevant for the present appeal, read as under:-

- “1]- अप्रार्थी संख्या 3 का निवेदन है, कि वाहन चालक हनुमानसिंह के पास वाहन आर.जे. 19/पी 0123 चलाने का वैध प्रोफेशनल लाईसेन्स, पोलिशी, की शर्तों के अनुसार नहीं था । इसलिए बीमा कम्पनी अप्रार्थी संख्या 3 हर्जाने की राशि अदा करने के लिए जिम्मेवार नहीं है ।

- 2]- अप्रार्थी संख्या 3 का निवेदन है, कि वाहन वक्त वाका वैध अनुज्ञापत्र (परमीट) से कर्वड नहीं थी, इसलिए अप्रार्थी संख्या 3 हर्जाने की राशि अदा करने के लिए जिम्मेवार नहीं है ।
- 3]- वाहन स्वामी आर.जे.19/पी0123 ने पोलिशी शर्तों की अवहेलना की है । इसलिए बीमा कम्पनी हर्जाने की राशि अदा करने के लिए जिम्मेवार नहीं है ।"

The Tribunal framed relevant issues for determination of the questions involved in the case about the responsibility towards the accident, on the quantum of compensation, and in relation to the defence put forward by the insurer. The parties led evidence in support of their respective stand and on behalf of the insurer was examined its Administrative Officer Subhash Chandra Bohra as NAW-1; a copy of the insurance policy was produced as Ex. NA/1 and that of the permit of the bus in question as Ex. NA/2.

In issue No.1, the Tribunal held that the accident occurred for rash and negligent driving of the bus in question that caused several bodily injuries to the claimant No.1 including fracture of his right femur bone and compound fracture on his right forearm. In issue No. 2, after assessment of the loss suffered by the claimant No.1, the Tribunal found him entitled for compensation in the sum of Rs.44,621/-. Issue No.3 in the present case was framed thus:

"3. आया वाहन संख्या आर.जे.19/पी.0123 के चालक के पास वैध ड्राइविंग लाइसेन्स नहीं था एवं वक्त दुर्घटना उक्त वाहन वैध परमिट से कवर्ड नहीं था ?"

On the two aspects involved in issue No.3, the Tribunal held in the first place that the driver of the offending vehicle, non-applicant No.1 Hanuman Singh, was holding a valid driving licence. On the second aspect related to the permit of the vehicle in question, the Tribunal referred to the statement of NAW-1 Subhash Chandra Bohra and to the permit Ex.NA/2 and found that as per the terms of permit, the vehicle could not have been plied on a nationalised route or any part thereof; but the accident occurred on Jodhpur-Balotra road that was a nationalised route; and as such it were a violation of the terms of permit. The Tribunal concluded that in such circumstances, the vehicle in question being not covered under valid permit, the insurance company was not liable for compensation. The entire consideration of the Tribunal on this relevant aspect relating to the permit reads as under:-

“अप्रार्थी सं03 की ओर से गवाह सुभाषचन्द्र बोहरा को पेश किया गया है, जिसने अपने बयान में कहा है कि वाहन सं0 आर.जे.19 पी.0123 हमारे यहाँ बीमित थी जो 20.3.90 से 19.3.91 के लिए बीमित थी। परमिट की फोटो कॉपी के मुताबिक यह बस पूरे राजस्थान के परमिट वाली थी, दुर्घटना जोधपुर-बालोतरा मार्ग की सड़क पर हुई थी जो राष्ट्रीयकृत मार्ग पर हुई थी एवं प्रदर्श एन.ए.-2 के मुताबिक यह बस राष्ट्रीयकृत मार्ग पर नहीं चल सकती क्योंकि इसके लिये परमिट नहीं दिया हुआ था। जिरह करने पर गवाह का कहना है कि यह बात सही है कि राष्ट्रीयकृत मार्ग पर यह वाहन

सवारियों ले जा सकती हैं, मुझे पता नहीं कि ओ.डी. क्लेम में दुर्घटनाग्रस्त को बीमा कम्पनी ने पैमेन्ट किया या नहीं। परमिट प्रदर्श एन.ए.2 के अवलोकन से यह स्पष्ट है कि "यह वाहन राष्ट्रीयकृत मार्ग एवं उसके किसी भी भाग पर नहीं चलाई जायेगी।" अप्रार्थी सं03 की ओर से इस सम्बन्ध में 1983 ए.आई.आर. राजस्थान पेज 245 पेश किया गया है जो इस मामले में पूर्ण रूप से लागू होती है। दुर्घटना जोधपुर-बालोतरा मार्ग पर कारित हुई और यह मार्ग राष्ट्रीयकृत मार्ग है अतः परमिट की शर्त के अनुसार वाहन सं0 आर.जे.19/पी.0123 राष्ट्रीयकृत मार्ग एवं उसके किसी भी भाग पर नहीं चलाई जा सकती थी। अतः परमिट की शर्तों का उल्लंघन किया गया है। ऐसी स्थिति में वक्त दुर्घटना उक्त वाहन आर.जे.19/पी.0123 वैध परमिट से कवर्ड नहीं होने के कारण बीमा कम्पनी क्षतिपूर्ति की राशि के लिए जिम्मेवार नहीं है।"

Consequently, the Tribunal proceeded to exonerate the insurer altogether and fastened the liability for payment of the amount of compensation on the non-applicants Nos.1 and 2, driver and owner of the offending vehicle.

Assailing the findings aforesaid, learned counsel for the appellant contended that the Tribunal has been in error in failing to consider that the vehicle was being plied under a valid 'All Rajasthan' permit; that there has not been any violation of the conditions of the insurance policy by the appellant; and that there was no reason for which the respondent-insurer could have been exonerated. Per contra, learned counsel for the insurer, while relying on a decision of the Hon'ble Supreme Court in the case of National Insurance Company Ltd. Vs. Challa Bharathamma and others: 2004 ACJ 2094 submitted

that in the admitted fact situation of the present case where the permit stipulated that the vehicle would not be plying on a nationalised route and where the accident did occur on a nationalised route, there was a clear violation of policy condition and the Tribunal has rightly exonerated the insurer.

Having given a thoughtful consideration to the rival submissions and having examined the record of the case with reference to the law applicable, this Court is clearly of opinion that the Tribunal has been in error in exonerating the insurer of its liability and the present appeal deserves to be allowed.

The learned Tribunal in the present case has proceeded on a fundamental error about the nature and scope of the defence of the insurer. The case of the insurer has been founded on the allegation that there was violation of the terms of permit. The learned Tribunal has also come to a finding that the terms of permit were violated; and on this basis alone has assumed that the Insurance Company was not liable to satisfy the award of compensation. The approach of the Tribunal is plainly contrary to law.

It is to be imbibed that an Insurance Company assumes a particular risk as per the terms of the insurance contract; and in the vehicular insurance, such contract of insurance is conditioned by the requirements of statute particularly those of the Motor Vehicles Act, 1988. An Insurance Company that has

assumed the risk in relation to a motor vehicle, while resisting any claim for compensation wherein any amount of award is to become payable by it, has been permitted to defend the action on limited grounds as enumerated in Section 149 (2) of the Act. The clause permitting a defence to the insurer in relation to the permit for use of a transport vehicle as contained in Section 149 (2) (a) (i) (c) could be read, omitting other phrases not relevant for the present purpose, in the following manner:-

"(2).....and an insurer shall be entitled to defend the action on any of the following grounds, namely:-

(a) that there has been a breach of a specified condition of the policy, being one of the following conditions, namely:-

(i) a condition excluding the use of the vehicle-

....
(c) for a purpose not allowed by the permit under which the vehicle is used, where the vehicle is a transport vehicle,"

It is at once clear that the defence available to the vehicle insurer is NOT of violation of terms of permit BUT of breach of some specified conditions of insurance policy, as detailed out in clause (a) of sub-section (2) of Section 149 of the Act. In relation to the permit for a transport vehicle, the breach (of insurance policy) envisaged by the statutory provision is of using the vehicle for a purpose other than that allowed by the permit.

A Division Bench of this Court in the case of National Insurance Company Limited Vs. Smt. Mohani Bai & Ors.: 2006 (1) MACD (Raj.) 665 has dealt with this aspect of the defence of an insurer relating to the terms of permit in sufficient detail. In the said case of Mohani Bai, the insurer sought exoneration on the ground that the vehicle in question was carrying excessive number of passengers than that permissible under the permit. The Tribunal found that the vehicle was carrying passengers much in excess of its seating capacity but did not accept the case of Insurance Company that it amounted to contravention of insurance policy and made the award against the insurer. A learned Single Judge of this Court affirmed the award of the Tribunal. The Insurance Company preferred intra-court appeal and relied, inter alia, on the decision of the Hon'ble Supreme Court in Challa Bharathamma's case (supra). While pointing out that the decision in Challa Bharathamma was of no help to the insurer for that was a case of no permit at all; and while dismissing the appeal after examining the law applicable to the case and a number of decisions dealing with the point, the Division Bench held,-

"On a plain reading of the Section 149(2)(a)(i)(c), it is obvious that the term 'purpose' therein refers to the purpose for which the vehicle is to be used. This is apparent from the words "a condition excluding the use of the vehicle" in clause (i) of which sub-clause (c) is part. The purpose in sub-clause (c) refers to the use of the vehicle, and where the vehicle is used for carrying passengers,

merely because the number of passengers was more than specified in the permit, it cannot be said that there was any violation of the purpose, that is to say, the vehicle was being used for a purpose other than allowed under the permit. The purpose refers to the permit, that is, allowed by the permit. Unless there is some major deviation from the purpose in the matter of use, it cannot be said that there was breach of condition of policy."

(underlining supplied)

In the said case of Mohani Bai, the Division Bench has noticed the decisions pointing out distinction between violation of permit conditions and a ground under sub-clause (c) of Section 149(2)(a)(i) of the Act thus:

'Before referring to the subsequent decisions we feel tempted to notice the observations of Justice Krishna Iyer of Kerala High Court, as he then was, while considering a similar plea in Kesavan Nair Vs. State Insurance Officer, 1971 KLT 380 decided in the context of the corresponding provisions of the old Motor Vehicles Act of 1939, as under:-

"The argument is fallacious and confuses between the purpose for which the vehicle is used and the conditions subject to which such purpose is effectuated. The purpose of the stage carriage was to carry passengers and, in this case, it is obvious that the bus was carrying passengers. If it had been used not for carrying human beings but goods like a truck, there might have been user for an unwarranted purpose. On the other hand if in carrying out the sanctioned purpose, namely transporting passenger, any conditions are violated either by overspeeding or overloading, for example there may be a violation of the conditions of the permit but one cannot say that by that breach, the vehicle is used for a purpose different from the one authorised by the permit."

In *United India Insurance Co. Ltd. Vs. Sabeer Ali*, 2000 ACJ 839, the vehicle was carrying 17 persons as against limit of 6 passengers including driver under the permit. Repelling the objection of the Insurance Company that the carrying of excess passengers amounted to breach of condition of policy, a Division Bench of the Kerala High Court held that under Section 149(2)(a)(i)(c), the Insurance Company can be absolved if the vehicle involved in the accident was being used for a purpose not allowed by the permit under which the vehicle was used. Where more passengers than the number permitted were found travelling in the vehicle, it cannot be said to be use for a 'purpose' other than purpose for which permit was granted. The Court observed that if the vehicle was used for carrying goods – and not passengers - then it would have come within the purview of clause (c). So also, if it was permitted to be used as a public goods carrier but was used to carry passengers then also it could come under clause (c). Merely because more number of passengers than was allowed under the permit were travelling, it cannot be said that the vehicle was used for a purpose not allowed by the permit. It may amount to a violation of permit conditions regarding number of persons to be carried in the vehicle. But, that will not be a ground under clause (c). We are in complete agreement with these observations."

(Underlining supplied)

The insurer contested its liability in the present case taking the averment in the reply that at the time of accident, the vehicle was not covered under valid permit. The insurer also took a general plea that the vehicle owner has violated policy conditions. However, the allegation has been specified in the statement of its Administrative Officer to the effect that

according the document Ex. NA-2, the vehicle was of 'All Rajasthan' permit; that the accident occurred on Jodhpur-Balotra nationalised route; and according to the permit Ex. NA-2, the said bus could not be plied on nationalised route. Thus, the precise allegation of the insurer in the present case has been of violation of the terms of permit for the vehicle being plied on a route not specified in the permit. The finding of the Tribunal is essentially to the same effect that there was contravention of the terms of permit; and then on the basis of such finding the Tribunal abruptly concluded that the insurer was entitled to be exonerated. The approach of the Tribunal is fundamentally incorrect. Neither there is any finding about breach of insurance policy condition by the insured nor there could be any. The insurance policy in the present case put the relevant condition while stating limitation as to use in the following words:-

"Use only under a contract carriage/stage carriage permit within the meaning of the Motor Vehicle Act, 1939."

For the purpose of present case, if the vehicle was found on a route not covered under the permit, it might be a case of violation of conditions of permit; but it cannot be said that by such fact alone, there occurred a breach of insurance policy condition. As noticed, the policy condition itself has been to use

the vehicle only under a contract carriage/stage carriage permit. The defence available to the insurer under sub-clause (c) of Section 149(2)(a)(i) is of breach of such a policy condition that excludes the use of vehicle 'for a purpose' not allowed by the permit under which the vehicle is used. It is not the case of the insurer that the vehicle was not being used as a contract carriage or was being used for 'any purpose' other than that envisaged by the permit Ex.NA-2. Merely because the permit stated a condition that the vehicle would not be plied on nationalised route and violation of such condition of the permit is alleged, the same is not even a remote allegation on violation of insurance policy conditions; and is not of a defence permitted to the insurer by the statute. The principles noticed and expounded in Mohni Bai's case (supra) do directly apply to the present case too; and the decision in Challa Bharathamma's case (supra) is of no application because that was a case of the vehicle having no permit at all.

It may also be pointed out that the witness of the insurer was put to specific cross-examination about 'O.D. claim' i.e., the claim of the insured for 'own damage' (because, according to the appellant, the said mini bus itself capsized in the accident and got damaged); but the said witness avoided answering on that aspect with the reply that it was not known to him if O.D. claim was allowed or not as he had not examined the

concerned O.D. claim file. The insurer was aware of the hollowness of its defence; and that came to the fore when the witness admitted in cross-examination that the said vehicle could carry passengers on nationalised route in the words,-

"यह बात सही है कि राष्ट्रीयकृत मार्ग पर यह वाहन सवारियों ले जा सकती हैं।"

The finding on issue No.3 in this case being obviously incorrect cannot be sustained and deserves to be set aside; and the insurer remains liable to satisfy the award in question.

As a result of the aforesaid, this appeal succeeds and is allowed; finding on issue No.3 in the impugned award is set aside; and the insurer is held liable to satisfy the award of compensation in the present case. It shall be required of the insurer to deposit within 30 days from today the remaining amount payable under the award in question for the purpose of the claimant and so also to indemnify the appellant in relation to the amount already paid. However, in the circumstances of the case, the parties are left to bear their own costs of this appeal.

(DINESH MAHESHWARI), J.

Mohan